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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO: 79-5267

ANTONIO PEREZ,

Petitioner,

vs.

Louie L. Wainwright, Secretary,
Florida Dept. of Offender
Rehabilitation

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO:

ANTONIO PEREZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, ANTONIO PEREZ, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on the 13th day of July, 1979.

OPINION BELOW

The full opinion of the United States Court of Appeals for the Fifth Circuit is attached hereto as Appendix A. The reported opinion appears at 594 F.2d 159.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. That judgment and opinion was entered on May 1, 1976. (App. A, B). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 13, 1979. (App. A, C). The mandate of the court was stayed until August 31, 1979, or alternatively, pending disposition of a timely filed petition for writ of certiorari. (App. D).

QUESTION PRESENTED FOR REVIEW

WHETHER IT IS FUNDAMENTALLY UNFAIR, IN CONTRAVENTION OF THE SIXTH AND FOURTEENTH AMENDMENTS, FOR THE STATE OF FLORIDA TO DENY THE INDIGENT PETITIONER APPELLATE REVIEW OF HIS CRIMINAL CONVICTION BECAUSE OF THE FAILURE TO FILE A TIMELY NOTICE OF APPEAL, WHERE THAT FAILURE WAS IN NO WAY ATTRIBUTABLE TO PETITIONER, BUT RATHER WAS DUE TO PETITIONER'S RELIANCE UPON FRAUDULENT REPRESENTATIONS BY HIS RETAINED COUNSEL.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of Florida law set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner Perez, an indigent, was convicted of robbery in the Circuit Court of the Eleventh Judicial Circuit of Florida. (App. D at 24). Prior to trial, the Public Defender had been appointed to represent him. (Id. at 23). However, petitioner's parents subsequently retained counsel who represented petitioner at trial.

At the post-trial "rendition of judgment" proceeding held on August 14, 1975, this retained counsel stated in open court that he had filed the notice of appeal essential to protect petitioner's appellate right. (App. F at 9). Under Florida law, such a notice would have been invalid as premature. (App. H, I, J). The trial court thereafter did not advise petitioner of his appellate rights and obligations, although such advisement is required under Florida law. (App. K, L).

The statement of defense counsel was untrue; no notice of appeal had in fact been filed when counsel's contrary representation to the court was made. And no notice of appeal was ever filed, despite the promise made by counsel

that he would take an appeal, and despite petitioner's reliance upon that promise.

Two days after the time period had elapsed for the pursuit of a timely appeal, petitioner's parents retained new counsel who unsuccessfully sought a belated appeal via a motion for "post-conviction relief." (App. E at 11-12). Thereafter, the Public Defender was appointed to represent petitioner. (App. E at 14).

On February 17, 1976, petitioner sought a belated appeal in the District Court of Appeal of Florida, Third District, raising the issues of the ineffectiveness of counsel, and the denial of his rights to due process of law and equal protection of the laws, via a Petition for Writ of Habeas Corpus Or, In the Alternative, Motion to Treat as a Timely Notice of Appeal. (App. E at 16-22). In this petition, it was alleged that counsel had promised petitioner that he would pursue an appeal and that petitioner had relied to his detriment upon counsel's promise. This application was denied two days after it was filed, on the ground that petitioner had been represented by private counsel at the time of trial. (App. E at 15).

On December 9, 1976, petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida, again alleging that his right to appeal had been thwarted by the ineffective assistance of his retained counsel. (App. E). Specifically, petitioner founded his federal claim on the guarantees of the Sixth and Fourteenth Amendments to the Constitution of the United States. The district court, after ordering an evidentiary hearing, concluded that petitioner was not entitled to habeas corpus relief under the Sixth Amendment, but was entitled to relief under the Fourteenth Amendment.

In granting relief, the district court made the

following findings of fact:

> [P]etitioner's privately retained counsel indicated to the state trial court at the sentencing proceeding that a notice of appeal had been filed, and further indicated to the petitioner subsequent to that proceeding that he would be prosecuting petitioner's appeal for him. No further contact was had between petitioner and his attorney, and no action was ever taken by counsel to perfect or prosecute petitioner's appeal. Petitioner was at all times indigent, albeit managed to obtain a private attorney at trial only through the assistance of his parents. He at all times relied on his attorney to perfect and prosecute his appeal. (App. G at 3)

In view of counsel's blatant misrepresentation, the court concluded that counsel's active course of misconduct at the "rendition of judgment" proceeding constituted wilful disregard for the responsibility placed upon him by the system. This conduct, which foreclosed whatever potential then existed for compliance by the trial court with the requirement that it advise petitioner of his appellate rights, was so unconscionable and deficient as to render the proceedings fundamentally unfair. (Id. at 4).

The respondent then appealed to the United States Court of Appeals for the Fifth Circuit. On May 1, 1979, the court reversed the grant of habeas corpus relief. (App. A). The court held that the district court's denial of relief under the Sixth Amendment was not clearly erroneous. The court further held that, despite its sentiments to the contrary, the precedent of the Fifth Circuit precluded it from affirming the grant of relief pursuant to the Fourteenth Amendment. The court stated that, were the issue being presented for the first time, the court would hold that where a lawyer does not perform his promise to his client that an appeal will be taken, fairness requires that the deceived defendant be granted a belated appeal.

A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed by petitioner. (App. C). This

petition was denied on July 13, 1979. (App. A).

Due to the extant conflict among the decisional law of the United States courts of appeals, and due to the important question of federal constitutional law herein raised which has not previously been resolved by this Court, this petition for writ of certiorari is hereby presented pursuant to Rule 19(1)(b) of this Court.

REASONS FOR GRANTING THE WRIT

THE HOLDING BELOW THAT PETITIONER WAS NOT DENIED DUE PROCESS OF LAW WHEN HIS RIGHT TO APPEAL WAS THWARTED BY THE DERELICTIONS OF DEFENSE COUNSEL DIRECTLY CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS AND PRESENTS A CONSTITUTIONAL QUESTION OF VITAL AND CONTINUING IMPORTANCE TO THE ADMINISTRATION OF THE CRIMINAL JUSTICE SYSTEM.

There is no distinct constitutional right to appellate review of a state criminal judgment. McKane v. Durston, 153 U.S. 684 (1894). Petitioner does not contend otherwise. Petitioner does submit, however, that where a state has provided for appellate scrutiny of all criminal convictions as a matter of right, it can be fundamentally unfair to deprive a defendant of the exercise of that right where the "waiver" of the appeal is occasioned by the derelictions of defense counsel. And where, as here, the failure to invoke timely the jurisdiction of the appellate tribunal is in no way attributable to the indigent petitioner, but rather, is due only to his, and the trial court's, detrimental reliance upon a fraudulent representation by retained counsel, all basic notions of due process of law are denigrated by the denial of a belated appeal.[1]

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[1] The due process issue presented in this case must be distinguished from that presented in Estelle v. Durrough, 420 U.S. 534 (1975), and National Union of Marine Cooks and Stewards v. Arnold, 348 U.S. 37 (1954). In Estelle, the deprivation of appellate review was a reasonable sanction to impose (cont.)

The requirements of due process of law "cannot be ascertained through mechanical application of a formula." Groppi v. Leslie, 404 U.S. 496, 500 (1972). Rather, the Due Process Clause, as effectuated through the art of judicial conscience, "is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-163 (1951) (Frankfurter,J., concurring), cited in, Groppi v. Leslie, 404 U.S. at 500.

An examination of the historical growth of the right to an initial appeal with the aid of counsel on that appeal, and the decisions of this Court and of the United States courts of appeals for the various circuits avowing protections of the appellate right, inexorably leads to one conclusion: the state's action of disentitling Petitioner Perez to appellate review cannot be reconciled with the fundamental precepts of due process of law.

Since 1894 when this Court recognized that states need not provide appellate review systems,[2] this Court has increasingly haled the significance of the "first appeal, granted as a matter of right to rich and poor alike, from a criminal conviction." Douglas v. California, 372 U.S. 353, 356 (1963) (citation omitted). Thus, despite the lack of constitutional compulsion for a state appellate review system,

1(cont.)
upon one who had escaped from custody. Similarly, in National Union of Marine Cooks and Stewards, the denial of appellate scrutiny was a reasonable device to employ against a union which had failed to purge itself of contempt by posting the requisite money bond pending appeal. In the case at bar, the sanction or irrebuttable presumption of waiver exacted comes as the result of neither misconduct, nor even action, on the part of petitioner.

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McKane v. Durston, 153 U.S. 684 (1894), so holds, noting that a citation of authorities to support this holding is unnecessary.

where an appellate avenue is provided a defendant,

> the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment. Frank v. Mangum, 237 U.S. 309, 327 (1915)

See also, Cole v. Arkansas, 333 U.S. 196, 201 (1948).

A full and fair resolution of the merits of "the one and only appeal" of right has become an integral part of the state criminal justice system. Douglas v. California, supra at 357. Indeed, in 1956, this Court noted with approbation that "[a]ll of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence." Griffin v. Illinois, 351 U.S. 12, 18 (1956).

The significance of state appellate review has further led the Court steadfastly to proclaim a mandate of equality to govern appellate proceedings. See, e.g., Rinaldi v. Yeager, 384 U.S. 305 (1966); Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, supra; Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, supra. Impediments to full appellate review of criminal convictions have been retroactively stricken by the Court to avert "the clear danger of convicting the innocent." Tehan v. United States, 382 U.S. 406, 416 (1966); accord, Stovall v. Denno, 388 U.S. 293, 297-298 (1967).[3]

Moreover, in exalting the value of the appellate

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The importance of the first direct appeal to "a correct adjudication of guilt" has been more recently underscored by the decisions of the Court which have refused to extend safeguards attendant to the first appeal to subsequent discretionary and collateral review proceedings. United States v. MacCollom,426 U.S. 317, 323-326 (1976); Ross v. Moffitt, 417 U.S. 600, 605-617 (1974).

process,[4] this Court has emphasized the correlative significance of securing counsel in the appellate court to protect and effectuate the appellate guarantee.[5] See Anders v. California, 386 U.S. 738 (1967); Douglas v. California, supra. Thus, the right to counsel on appeal has been held a retroactive requisite binding upon the states due to the combined significance of the right to counsel and the right to an appeal in ensuring an adequate truth-finding process.

> The right to counsel at the trial (Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799) on appeal (Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811) and at the other "critical" stages of the criminal proceedings (Hamilton v. State of Alabama, supra) have all been made retroactive, since the "denial of the right must almost invariably deny a fair trial." See Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199. Arsenault v. Commonwealth of Massachusetts, 393 U.S. 5, 6 (1968) (footnote omitted)

Against this historical and precedential backdrop, the need for federal intervention in this case becomes focused. While due process scrutiny of state criminal proceedings is necessarily narrow, where a defendant is deprived of the effective assistance of counsel on appeal to the end that no appeal at all is obtained, a federal claim commanding rectification is presented. And indeed, the United States courts of appeals which have addressed this issue, save the court below, have consistently so concluded.

The most recent federal decision recognizing the constitutional dimension of petitioner's claim is Boyd v. Cowan, 519 F.2d 182 (6th Cir. 1975). There, the court first framed the "narrow question" presented:

> [W]hether as a federal Constitutional matter Kentucky denied appellant due process in refusing his motion for belated appeal when his statutory time for appeal expired without action due to failure of his retained counsel to give appellant personal and timely notice that he did not intend to file or process appellant's appeal. Id. at 183

The Boyd Court reached the conclusion that a belated appeal was required, employing reasoning predicated upon the constitutional right to counsel to appeal a criminal conviction. Concomitantly, the court emphasized the lack of a waiver by the petitioner of the right to an appeal or to counsel on that appeal. This holding of the Sixth Circuit was in accordance with its previous precedent which had recognized that the abandonment of an appeal by a retained lawyer without warning to the convicted client is tantamount to a deprivation of the right to counsel. Woodall v. Neil, 444 F.2d 92 (6th Cir. 1971).

Similarly, the United States Court of Appeals for the Fourth Circuit, in Shiflett v. Commonwealth of Virginia, 433 F.2d 124 (4th Cir. 1970), cert. denied, 405 U.S. 994 (1972), upheld the federal claim of a petitioner who had been deprived of an appeal due to the actions of his retained counsel. The record established that the petitioner had desired an appeal, had relied upon his attorney to perfect an appeal, and had not been informed by his counsel that an appeal was not being pursued. On these facts, the court concluded that the constitutional right to the assistance of counsel for the purposes of appeal had been abridged.[6] See also, Sanders v. Cravan, 488

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[4] Indeed, even in the civil context, this Court has been receptive to claims that state burdens imposed upon the exercise of the statutory right to appeal are constitutionally offensive. See, e.g., Lindsey v. Normet, 405 U.S. 56 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971).

[5] Necessarily included within this right to counsel guarantee is the right to the effective assistance of counsel. See, e.g., McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970).

[6] Shiflett v. Commonwealth of Virginia, supra, was a consolidated opinion. Rehearing en banc was subsequently granted by the Fourth Circuit to reconsider the panel decision to the extent that it had accorded relief to petitioners who had not been fully advised of the right to appeal by either counsel or the trial court. Shiflett v. Commonwealth of Virginia, 447 F.2d 50 (4th Cir. 1971). The majority opinion declined to hold retroactive the new constitutional standard requiring full advisement; the opinion also made clear the propriety of the grant of a belated appeal to the petitioner whose appellate right had been lost due to detrimental reliance upon assurances by counsel. Id. at 55, 56.

F.2d 478 (9th Cir. 1973); Gairson v. Cupp, 392 F.2d 210 (4th Cir. 1968); Wynn v. Page, 369 F.2d 930 (10th Cir. 1966).

In the same vein, the Court of Appeals for the Eighth Circuit held, in Blanchard v. Brewer, 429 F.2d 89, 91 (8th Cir. 1970), cert. denied, 401 U.S. 1002 (1971), that the failure of the state to accord the petitioner an appeal solely due to the ineffective conduct of his retained counsel constituted treatment by the state that so invidiously classified petitioner "as to shock the conscience and consequently to violate due process." In rejecting the propriety of a distinction between the ineffective conduct of retained versus court-appointed counsel when the result is the evisceration of the appellate right, the court explained:

> Indeed, failure by appointed or retained counsel to commence the simple steps for appeal is a blatant denial of due process. (Citations omitted). Distinctions between gross or simple negligence on the part of counsel, or between active or passive negligence on the part of the state are immaterial. Whether counsel's conduct is classified as passive or active is irrelevant, since in either case appellee has been denied effective and complete appellate review through no fault of his own. Id. at 90 (citations omitted)

The resultant denial of "fundamental fairness" required the grant of habeas corpus relief.[7]

Due process analysis similarly compelled the United States Court of Appeals for the Second Circuit to grant habeas corpus relief to a petitioner whose appellate rights had been

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[7] It should be noted that the ineffective act of retained counsel in Blanchard was not the failure to file a notice of appeal, but rather, the failure to serve the written notice on the state attorney after orally advising of the intent to appeal. The respondent had argued that the petition should be denied since defense counsel had not committed gross misconduct, such as completely failing to file a notice of appeal, but had merely acted in error. The Eighth Circuit flatly rejected this distinction since in either case, due process was impugned by the state's denial of an appeal as the byproduct of the inactions of counsel.

thwarted by his retained counsel. In United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967), retained counsel had failed to pursue an appeal, although he knew that his client desired such and that an appeal was meritorious. This failure was attributable to other demands on his time and due to a belief that his client's interests could be served through certain further negotiations with the state.

The court of appeals, in determing that "fundamental fairness" had been abrogated, emphasized that its resolution of the case placed no premium on ineffective representation by counsel, nor any burden upon trial courts to supervise possible ineffective conduct of attorneys. Rather, since at issue was post-trial "representation" of which the petitioner was unaware, and since the result was the total deprivation of a direct appeal, the grant of the writ of habeas corpus in no way contravened traditional policy obstacles to the award of a new trial based upon the ineffectiveness of private counsel. The court concluded:

> Here, counsel's post-trial conduct contrary to his client's wishes is not attributable to the accused, who was unconscionably prejudiced thereby. Fundamental fairness requires that he be granted the rights which were lost to him through no fault of his own. Id. at 133-134 (footnote omitted)

Reasoning similar to that of the Second Circuit led the First Circuit to uphold a denial of habeas corpus relief where the failure of retained counsel to perfect an appeal was the result of a tactical decision of which the client had been advised. Leventhal v. Gavin, 421 F.2d 270 (1st Cir. 1970), cert. denied, 398 U.S. 941 (1970). Originally, that court had reversed the summary dismissal by the district court of the petition for writ of habeas corpus since it had been unclear whether retained counsel's conduct had been deliberate and with the approval of the petitioner. In so reversing, the court had recognized that under appropriate circumstances the failure to perfect an appeal would be an effective denial

of counsel.[8] Levanthal v. Gavin, 396 F.2d 441, 442 (1st Cir. 1968). Only after the district court found that the state appeal had not been pursued due to a tactical determination made by counsel and known to the petitioner, did the court of appeals countenance the denial of a belated appeal.

The United States Court of Appeals for the Third Circuit employed identical reasoning in upholding the denial of habeas corpus relief in United States ex rel. O'Brien v. Maroney, 423 F.2d 865 (3d Cir. 1969). There, the petitioner had been informed by his retained counsel that an appeal would be futile and therefore was cognizant of the fact that no appeal would be effected. The court, in rejecting the petitioner's assertion of a due process violation, distinguished the case from one where a defendant is deprived of an appeal through the deceitful conduct of counsel:

> Nor is this a case in which counsel fraudulently led his client to believe that an appeal was being processed, or in which counsel simply abandoned the appeal after his client's financial resources were exhausted. There is absolutely no evidence that appellant was at any time deceived by his attorney. In brief, the record is barren of any showing of "misconduct of his counsel amounting to a breach of his legal duty faithfully to represent his client's interests." Id. at 870

In striking contrast, the present record does present proof of inexplicably deceitful conduct by counsel compelling a finding of "a breach of his legal duty faithfully to represent his client's interests." The false proclamation by defense counsel that a notice of appeal had been filed, followed by the total abandonment of Petitioner Perez at this critical stage, violates all "canons of decency and fairness." Malinski v.

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[8] The fact that Petitioner Levanthal was represented in the state court by retained counsel can be gleaned from the state court opinion, Commonwealth v. Hamblen, et al., 225 N.E.2d 911, 916 (Mass. 1967).

People of State of New York, 324 U.S. 401, 416-417 (1945)[9]

Indeed, the panel decision does not conclude otherwise. Rather, the court makes clear that, absent the precedent of the Fifth Circuit adverse to petitoner's claim, the finding of "fundamental unfairness" made by the district court would be upheld:

> What is or is not "fundamental unfairness" cannot of course be identified by litmus. Ultimately the characterization is visceral and emotional. Indeed the very term "fundamentally unfair" has pejorative overtones. Were we approaching the issue for the first time, we would hold, as did the district judge, that, when a lawyer, by definition a member of a learned profession and a member of the bar of the court, does not perform his promise to his client that an appeal will be taken, fairness requires that the deceived defendant be granted an out-of-time appeal. (App. A at 5)

This conclusion of the court, consistent with the conclusion uniformly drawn by the courts of appeals throughout the United States, is sound. Regrettably, the panel members were constrained to reverse, although while doing so they paused to lament, "Our sentiments are repressed by our duty to adhere to the prior decisions that we cannot distinguish." Ibid.

The panel's adverse resolution, while compelled by the decisions of the Fifth Circuit, is contrary to the precedent of each circuit which has addressed the issue. Moreover, and most significantly, its resolution is contrary to the reality of the deprivation at issue, as elucidated in the case law of

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[9] The most fundamental rules of ethics and obligations of the legal profession were broken by counsel's total disregard of the interests of his client. See ABA Code of Professional Responsibility, DR 2-110(A); ABA Standards, The Defense Function §§8.2, 8.3 (1971); ABA Standards, Criminal Appeals §2.2 (1970).

this Court.[10] The denial of an appeal to petitoner, as the result of counsel's abdication of his solemn duty, is "shocking to the universal sense of justice". Betts v. Brady, 316 U.S. 455, 462 (1942).The limits that traditionally bind our federal courts impose no rein upon the review of petitioner's fundamental due process claim.

> Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions. Rochin v. California, 342 U.S. 165, 170-171 (1952)

In the case at bar, the interests of Petitioner Perez and society coincide. Moreover, the traditions of our profession, the precedent of our Court, and the Due Process Clause of our Constitution all beg the declaration that "fundamental unfairness" has occurred. The constraints bemoaned by the court below must be undone.

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[10] It should be noted that in the federal context, this Court has acknowledged the propriety of providing a belated appeal to a defendant whose right to appeal is frustrated by the ineffective representation by retained counsel. Rodriguez v. United States, 395 U.S. 327 (1969). In such a case, no specification of the points that would have been raised on appeal is required.

CONCLUSION

The critical significance of the question presented, as well as the need for harmonization of the decisions of the courts of appeals on this question, mandate the issuance of the Writ of Certiorari.

Respectfully submitted,

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